

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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SPANSKI ENTERPRISES, INC. and :
POLTEL INTERNATIONAL L.L.C., :
 :
Plaintiffs, :
 :
-against- :
 :
TELEWIZJA POLSKA S.A., ANNA :
MILEWSKA, KRZYSZTOF SZTANDERA, :
MARCIN BOCHENEK, JOHN DOES 1-10, :
 :
Defendants, : 07 Civ 930 (GEL)
 :
TELEWIZJA POLSKA S.A., : **DECLARATION OF BOGUSŁAW M.**
 : **SPAŃSKI IN SUPPORT OF MOTION**
Counterclaim and Third-Party Plaintiff, : **FOR SUMMARY JUDGMENT**
 :
-against- :
 :
SPANSKI ENTERPRISES, INC., POLTEL :
INTERNATIONAL L.L.C., :
TELEWIZJA POLSKA U.S.A. INC., :
TELEWIZJA POLSKA CANADA INC., :
BOGUSŁAW M. SPANSKI and EUROVU, :
S.A., :
 :
Counterclaim and Third-Party Defendants. :
 :
----- X

I, BOGUSŁAW M. SPAŃSKI, declare under penalties of perjury under the laws of the United States of America that the following is true and correct:

1. I am the owner of Spanski Enterprises Inc. ("SEI"),¹ the plaintiff in this action. I am also a named third-party defendant. I have personal knowledge of the matters set forth

¹ I own 89% of SEI and my wife Maria owns the other 11%.

herein, and respectfully submit this declaration: (a) in support of SEI's motion for summary judgment as to its claims of copyright infringement and breach of contract; and (b) in support of the Counterclaim and Third-Party Defendants' motion for summary judgment dismissing Defendant Telewizja Polska S.A.'s ("TVP") counterclaims and third-party claims in their entirety.

OVERVIEW

2. As set forth more fully below, in December 1994 SEI entered into an agreement with TVP whereby SEI acquired the exclusive right to re-broadcast TVP's Polish-language television channel *TV Polonia* in North and South America. In 1999, the parties' agreement was amended such to make absolutely clear that SEI had also acquired the exclusive right to distribute *TV Polonia* programming on the Internet. The parties were so satisfied with their business relationship that in 2002 the agreement was amended a second time such to include a second channel, *TVP 3 Regionalna* ("*TVP 3*").

3. In 2005 and 2006, however, TVP's senior management was almost entirely replaced, and the new management (who had no personal knowledge of the parties' contractual performance since 1994) viewed TVP's relationship with SEI to be "grossly disadvantageous" to TVP, both financially and otherwise. Notwithstanding that TVP recognized that it had entered into a binding and long-term exclusive agreement with SEI, TVP actively sought a means to "break" the agreement (including the wrongful initiation of an arbitration proceeding in Warsaw) and began direct negotiations for the distribution of *TV Polonia* and *TVP 3* in the Americas with SEI's direct competitors (thus undermining SEI's own efforts to expand the distribution for the channels).

4. Following SEI's initiation of this action to enjoin TVP's distribution of *TV Polonia* and *TVP 3* in the Territory, and the further prosecution by TVP of the arbitration proceeding it had wrongfully initiated in Warsaw, TVP filed a broad host of retaliatory counterclaims – the vast majority of which were premised upon wholly newfound contractual constructions designed to dramatically limit, or eliminate, SEI's exclusive rights and, in real terms, to put SEI out of the business that it single-handedly developed over the years.

5. For example, after almost fourteen years of SEI's exclusive re-broadcast of *TV Polonia* in North and South America, TVP now argues – contrary to the overwhelming documentary evidence including the parties' agreement itself – that SEI was never granted the right to re-broadcast *TV Polonia* in the first instance, that SEI's rights under the agreement are non-exclusive, and that SEI was not even granted the right to use the *TV Polonia* trademark.

6. Similarly, following more than a decade of SEI's financial reporting to TVP (the form of which TVP accepted for years without complaint but which it now claims breaches the parties' agreement for at least five different reasons), TVP now claims that SEI somehow underpaid TVP because it paid royalties based upon revenues received, rather than based upon fees generated at the source (*i.e.*, 8% of subscriber fees paid to the cable and satellite companies). TVP argues that its prior written statements and financial reviews of SEI's books and records in this regard were simply erroneous.

7. Because TVP has raised a number of baseless legal positions which necessarily raise issues as to the parties' intent in entering into their initial agreement fourteen years ago, this declaration is divided into three parts. In Part I, I set forth the factual background and overview of the parties' fourteen-year relationship, under the following topics, in essentially chronological order:

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PART I

My Background

10. I was born and raised in Poland. In 1980, during a time of widespread fear of possible Soviet invasion (caused, in part, by the perceived threat of the emerging Solidarity movement), I left Poland with my wife and three-year-old son. Following our departure from Poland, my family and I spent the next seven months in a refugee camp in Italy where we were granted political asylum. Ultimately, we were permitted to emigrate to Canada. Eight months after our arrival in Canada, the Polish Government declared martial law and closed the Polish airports and borders.

11. In Canada, I initially secured employment as an architect, as I had received an architectural degree in Poland. I was fascinated, however, with the market economy and, in particular, the stock market. After losing all of the little money I had saved investing in stocks, I invented a board game based on the operation of the stock markets which I named "*Investor*." In 1984, I formed Spanski Enterprises Inc. ("SEI," a Canadian corporation), left the practice of architecture, and allocated all my time and attention to marketing the *Investor* board game to potential buyers. Eventually, SEI licensed the rights to manufacture and distribute *Investor* to Playtoy Industries, a major Canadian board game and toy distributor. As part of the marketing and promotional efforts for the game (which became commercially available in advance of the 1985 Christmas season), I toured Canada from coast to coast, appeared on numerous television and radio shows, and was featured in an article published by Canadian Business monthly magazine.

12. *Investor* was brought to market and turned out to be a major success. I then sought to utilize my design skills in the further establishment of my own business. I co-founded a publishing company called Trends International, which eventually had more than 30 employees, and became a market leader in the license and distribution of posters, calendars, and children's coloring books. See generally <www.trendsinternational.com>.

13. By 1989, I became increasingly interested in developing business opportunities involving my native country. At this time, there were dramatic political changes occurring in Poland. Namely, it became the first democratic country from the former Soviet block. A Solidarity-led coalition government was formed, and in December of the following year, 1990, Lech Wałęsa was elected the President of Poland. I was fascinated by the changes in my native country – changes I dreamed of my whole life. I started visiting Poland frequently, observing the changes taking place, and assessing how the experience I gained living and working in Canada could be utilized in my native land. As the result of my interest in Poland, and the time I was spending there, I decided that I should sell my interest in Trends International (which I did in early 1990), and start a new venture which involved my native Poland.

14. I established a new company, Club S International Corporation (“S” for “savings,” not for Spanski as some may think). Club S operated a customer loyalty management system in Poland – along the lines of a credit card “rewards” program or grocery store “loyalty” card. At the time, “rewards” and “loyalty” programs were essentially unheard of in Poland (where asking for a discount was an unpopular cultural fixture). Over time, Club S grew to more than one million members and 350 employees, and managing the company required that I frequently travel to Poland for extended periods of time.

The Initial Negotiations Between SEI and TVP

15. Both in my business dealings (in which I had the opportunity to interact with a great number of people of Polish descent living in North America) and as a Polish emigrant myself, I perceived an emerging market to provide the Polish emigrant community in North America with quality Polish-language television and radio.

16. Thus, when Defendant Telewizja Polska, S.A. ("TVP") launched the satellite television channel called *TV Polonia* in March 1993, it sparked my interest. TVP is wholly-owned by the Polish Government and is the official Polish public broadcaster. One of TVP's divisions, the TV Polonia Programming Department (which is responsible for the *TV Polonia* channel), has the mandate of creating and distributing Polish-language public television addressed to the Polish-diaspora worldwide.

17. In late 1993, I was approached by Mr. Paweł Jedlewski, whose wife was then employed by Club S in Poland, with the suggestion that, as a successful entrepreneur in both Poland and North America, I should become involved in the distribution of *TV Polonia* in North America. At the time, Mr. Jedlewski was employed by TVP in its TV Polonia Programming Department.

18. Mr. Jedlewski advised me that TVP was actively searching for a new partner who would underwrite the risk and expense of transmitting the signal of *TV Polonia* to North America, and to develop a market for its distribution there, as TVP's original partner had failed to accomplish the task. Mr. Jedlewski provided me the contact information of the President of TVP, Mr. Wiesław Walendziak, to whom I addressed my initial written inquiry in January 1994. Mr. Walendziak responded by asking me to initiate discussions with the TV Polonia Programming Department. I had some initial meetings with the senior members of the TV

Polonia Programming Department, and then was advised to commence negotiations with Mr. Jerzy Romański, the head of TVP's Department of International Trade and Cooperation. I was encouraged by representatives of the Polish Government (who knew of my business accomplishments both in Poland and in North America) to undertake negotiations with TVP to obtain a license to distribute *TV Polonia*, and I did so.

19. Mr. Romański initially advised me that TVP was, indeed, actively seeking a partner who would bear the risk and underwrite the costs associated with transporting the signal of and re-broadcasting *TV Polonia* in North America. During the negotiations that followed, Mr. Romański advised me that TVP did not want to incur any of the necessary costs and expenses related to the transmission of the *TV Polonia* signal to North America or the development of a North American market for the channel's distribution. TVP viewed this as a very high risk venture, and it was not TVP's mandate to undertake such high risk undertakings. Thus, TVP's primary interest was to enter into an agreement with a partner who could fully underwrite the costs associated with such distribution, including all "start-up" costs. In order for the venture to be economically feasible to SEI, I explained and clearly presented to TVP that in exchange, TVP would have to grant SEI the long-term, exclusive right to distribute and re-broadcast *TV Polonia* in North and South America.

20. In this action, TVP produced minutes of a January 28, 1994 meeting which I attended in Poland to discuss the proposed cooperation between TVP and SEI. A true and correct copy of the minutes (in Polish) is annexed hereto as Exhibit 1. A certified English translation of the meeting minutes is annexed hereto as Exhibit 2. The meeting minutes document that SEI's demand for an exclusive license to re-broadcast *TV Polonia* was the lynchpin of any proposed agreement:

The Canadian party [SEI] is inclined to establish cooperation in respect to introducing TV POLONIA on the American market **provided they obtain the exclusive rights** for the transmission in the DBS system [Direct Broadcasting System].

Exhibit 2 at ¶ 9 (emphasis added).

21. Very shortly after this meeting, on or about February 1, 1994, SEI sent TVP a “Proposal of Cooperation with TV POLONIA on the North American Market.” A true and correct copy of the proposal (in Polish) is annexed hereto as Exhibit 3. A certified English translation of the proposal is annexed hereto as Exhibit 4. In this proposal SEI made clear that:

The basic condition for realizing the venture of bringing TV POLONIA onto the North American market is the acquisition from [TVP] of an **exclusive license for re-broadcast of the whole and integral TV POLONIA program** on the North America continent.

Exhibit 4 at 2 (TP7006367) (emphasis added).

22. In exchange for TVP’s grant to SEI of the exclusive right to re-broadcast *TV Polonia* in North America, SEI proposed to underwrite the costs associated with transmitting the television signal to North America and agreed to pay TVP an “[a]llocation of 8% to TELEWIZJI POLSKIEJ S.A. [TVP] from the gross revenues received by [an SEI affiliated company] as compensation” in connection with the “re-broadcast” of the program. Exhibit 4 at 4 (TP7006369); see id. at 3 (TP7006368) (disclosing that subscriber revenues would likely be generated pursuant to “several different package variants and combinations” of programming). Prophetically, SEI also forecast that yearly revenues “should stabilize at around 2-3 million dollars annually” – exactly as it turned out. Exhibit 4 at 3 (TP7006368).

23. In a memorandum dated February 9, 1994 (a copy of which is annexed hereto as Exhibits 5 (Polish) and 6 (certified English translation), Adam J. Gałczyński of TVP’s *TV Polonia* Promotional Department summarized and analyzed SEI’s proposal, and concluded that

the proposed royalty of 8% of the gross revenues received by the SEI affiliated companies was a “safe” one, and proposed that a contract be entered into with SEI providing “[t]hat **exclusive rights be granted to broadcast [the] TV POLONIA program** on the DBS system.” Exhibit 6 at TP7006379 (emphasis added); see also Exhibits 7 (Polish) and 8 (certified English translation) at TP7002981 (internal TVP letter, dated October 7, 1994, from Mr. Romański to Stanisław Nowak advising “that negotiating an Agreement with the company Spanski Enterprises Inc., in the matter of **re-broadcasting TV Polonia programs** on the American continent, is a complicated issue”) (emphasis added); Exhibit 9 (October 19, 1994 fax from Mr. Romański to Reuters Television attaching “the business card of our [TVP’s] partner Mr. Bob Spanski with whom we negotiate the **rebroadcast of TVP satellite program TV Polonia** in [the] US and Canada”) (emphasis added).

The 1994 Agreement Between SEI and TVP

24. After nearly one year of negotiations, SEI and TVP entered into an agreement (the “Agreement”) dated as of December 14, 1994. A true and correct copy of the Agreement (in Polish) is annexed hereto as Exhibit 10. A certified English translation of the Agreement is annexed hereto as Exhibit 11. The Agreement was drafted primarily by TVP’s legal department (SEI was not represented by counsel), and was executed on TVP’s behalf by two members of its Management Board, Bronisław Borkowski and Wiesław Walendziak, its President.

25. Pursuant to the Agreement – and in accordance with the parties’ prior proposals and discussions – SEI acquired the exclusive, long-term right to re-broadcast *TV Polonia*, including its copyrighted content, in North and South America (the “Territory”) via satellite, cable, as well as any other signal distribution technology. See Exhibit 11 (Agreement) at §§ 2(2), 2(3), 5(1) (“TVP gives SEI the **exclusive right** to one-time use of TV Polonia shows in its

Program”; “To implement Section 2 above, **TVP grants SEI the exclusive right to receive and use the Signal in the Territory**”) (emphasis added); *id.* at § 10 (providing for a term of twenty-five (25) years with an option to extend for ten (10) additional years). It was the intent of the parties and well understood by TVP (and in conformity with the parties’ negotiations and the express language of the Agreement itself), that SEI was granted the exclusive right to re-broadcast the *TV Polonia* channel (in its entirety or any individual show) in North and South America. The “one-time use” language was only included in the Agreement (and later the Addendum) to ensure TVP that SEI would not record the individual TV Polonia shows and then sell VHS and/or DVDs containing the individual shows. At the time the Agreement was signed, TVP was contemplating entering into the VHS/DVD business itself. TVP did in fact enter this market, and to this day, continues to sell VHS and DVDs containing *TV Polonia* shows throughout the world.

26. In exchange for TVP’s grant to SEI of the exclusive right to re-broadcast *TV Polonia* in the Territory, SEI agreed, among other things, to bear the costs associated with the transfer and re-broadcast of the signal, and to pay TVP a sum equal to eight percent (8%) of the revenues SEI received each calendar quarter derived from its exploitation of *TV Polonia*, specifically from the revenues received by SEI from subscription fees and advertisements. See Exhibit 11 (Agreement) at §§ 4(3), 6.

Contractual Performance – Confirmation of SEI’s Exclusive Right to Re-Broadcast

27. Following the execution of the Agreement, SEI expended extraordinary efforts to promote and market *TV Polonia* to cable television and satellite television operators and potential subscribers throughout North America. SEI expended well in excess of \$1 million establishing the necessary infrastructure to facilitate the distribution of *TV Polonia* including,

among other things, establishing the necessary corporate operating companies, hiring executives, marketing and technical personnel, transmitting the signal from the European satellite to the North American satellite and acquiring the necessary satellite equipment for the downlink of the *TV Polonia* signal for further distribution to various cable and satellite television operators.

28. In accordance with section 8 of the Agreement, SEI formed an affiliated company, Poltel International L.L.C. ("Poltel"), a Delaware limited liability company, to which it assigned certain of its rights under the Agreement. A true and correct copy of the March 7, 1995 assignment (the "Assignment") from SEI to Poltel is annexed hereto as Exhibit 12.

29. Poltel, which was formed merely as a holding company for asset protection purposes, thereafter licensed the right to distribute *TV Polonia* in Canada and the U.S. to two additional SEI affiliates, Telewizja Polska Canada, Inc. ("TVP Canada") and Telewizja Polska U.S.A., Inc. ("TVP USA"). A true and correct copy of the March 14, 1995 license from Poltel to TVP Canada is annexed hereto as Exhibit 13. A true and correct copy of the March 14, 1995 license from Poltel to TVP USA is annexed hereto as Exhibit 14.

30. TVP was well aware of the corporate structure created by SEI to carry out the Agreement and wholly consented to and approved of the corporate names, which included "Telewizja Polska." Indeed Adam Brodziak (a member of the TVP Management Board) and Wiesław Walendziak (President of the TVP Management Board) signed a number of English and Polish language statements, which were to be provided to SEI's potential distribution partners in North America, confirming the exclusive re-broadcast rights of SEI and its affiliated companies TVP USA and TVP Canada. The first statements, true and correct copies of which are annexed hereto as Exhibits 15 (Polish) and 16 (English), provided that:

... Telewizja Polska USA Inc. represented by Mr. B.M. (Bob) Spanski and Mr. B.T. (Bob) Pisarek is the only legal entity having the right,

granted by exclusive agreement, to receive and rebroadcast on the territory of the United States of America the satellite programme produced by TELEWIZJA POLSKA S.A. known as TV Polonia.

Exhibit 16 at SEI 000005 (emphasis added).

31. The second set of statements (true and correct copies of which are annexed hereto as Exhibits 17 (Polish) and 18 (English)) similarly confirmed that TVP Canada had the exclusive right to receive and rebroadcast *TV Polonia* in Canada. See Exhibit 18 at TP7000087; see also Exhibits 19 (Polish) and 20 (certified English translation) at TP7004250 (March 15, 1995 letter from the President of the TVP Management Board, Wiesław Walendziak, to the Chairman of the Polish American Congress, Edward Moskal, stating: “In accordance with [the Agreement], Spanski Enterprises Inc., with the goal of bringing this venture into existence, has founded two companies – Telewizja Polska USA Inc. and Telewizja Polska Canada Inc., **having the exclusive right to receive and distribute the satellite programs of Telewizja Polska S.A. in North America under the name TV POLONIA.**”) (emphasis added).

32. TVP was also well aware that the exclusivity that it had granted SEI extended beyond the signal of *TV Polonia* in its entirety, and included exclusivity in the Territory as to each of the individual shows which comprised *TV Polonia*. For instance, on May 24, 1995, TVP’s legal advisor, Ryszard Świdorski issued a legal opinion (a copy of which is annexed hereto as Exhibits 21 (Polish) and 22 (certified English translation)) which warned TVP that providing American or Canadian television stations with individual shows of *TV Polonia* would cause TVP to be in breach of section 2(2) of the Agreement between SEI and TVP:

LEGAL OPINION

Regarding the interpretation of paragraph 2, section 2 of the agreement of December 14, 1994, between TVP S.A. and Spanski Enterprises Inc.

Upon analysis of the text of paragraph 2, section 2 of the abovementioned agreement, there is no doubt that TVP S.A. granted SEI exclusive rights to the use of the TV Polonia Broadcast in the framework of the Program. These exclusive rights are also unequivocally confirmed by paragraph 2, section 3 of the agreement which states that for the purpose of the realization of section 2, TVP grants SEI exclusive rights to receive and use the signal on the Territory.

Providing access to “Wiadomości” and “Panorama” to local Polonia stations in the USA and Canada would infringe on the exclusive rights granted SEI under paragraph 2, sections 2 and 3 of the agreement and could have the following consequences:

a) a determination that TVP S.A. has seriously breached the agreement

Exhibit 22 at TP7006700 (emphasis in original); see also Exhibits 23 (Polish) and 24 (certified English translation) at TP5000432 (June 28, 2005 letter from an unknown TVP employee² to TVP’s Chairman of the Board, providing that: “The legal adviser in the Office of Legal Organization, Mr. [], Esq., supports the opinion issued earlier that in light of the separate articles in the Agreement with [Mr. Spanski], if the programs “Wiadomości” or “Panorama” were sent to Polonia stations in the same format as these are broadcast by TV POLONIA, then TVP S.A. would be violating that same agreement.”).

33. Shortly after this legal opinion was issued, on June 12, 1995, Marta Suchodolska, Deputy Director of TVP’s Bureau of Trade and Foreign Cooperation, sent me a fax (a true and correct copy of which is annexed hereto as Exhibits 25 (Polish) and 26 (certified English translation)) confirming SEI’s exclusive rights in the Territory as to the individual programming which comprised *TV Polonia*:

² TVP initially produced documents in this action in redacted form. On July 27, 2007, Magistrate Judge Gabriel W. Gorenstein granted Plaintiffs’ motion to compel TVP to produce unredacted copies of these materials. TVP did not produce Exhibit 23 in unredacted form, however.

... I would like to advise you ... that I have informed local Polonia stations, that from this day forward we are suspending (in accordance with the Agreement between TVP S.A. and Spanski Enterprises Inc.) access to “*Wiadomości*” (News), “*Panorama*”, “*Teleexpress*”, and “*Magazyn Kulturalny*” (Culture Magazine), that form an integral part of the “TV POLONIA” program.

Exhibit 26 at TP7003598; see also Exhibits 27 (Polish) and 28 (certified English translation of June 9, 1997 letter from TVP to Polish Television-Chicago advising “that the rights to news programs, within the TV Polonia program, are held by Mr. Spanski”); Exhibits 29 (Polish) and 30 (certified English translation) at TP 7006672-74 (legal opinion concluding that “TVP executed into [*sic*] an exclusive Agreement with the SEI company ... for the distribution of the TVP program on the territories of the USA and Canada,” and advising that distribution with another party would be an “infringement of the rule of exclusivity”).

SEI Successfully Launches the Re-Broadcast of *TV Polonia* in North America

34. In accordance with the Agreement (see Exhibit 11 (Agreement) at § 5(2)) SEI, by its affiliate TVP USA, launched the satellite re-broadcast of *TV Polonia* free-to-air (*i.e.*, the broadcast of the television signal is not scrambled or “encrypted” and, as such, can be viewed at no cost to the end-user) in North America on September 12, 1995. The launch was viewed by all involved as an historic event, and was marked by ceremonies at the Polish embassy in Washington D.C. The initial television broadcast included speeches by Poland’s President and Prime Minister congratulating TVP as to this monumental undertaking, as well as other programming, specially chosen by TVP and specifically intended for 24 hour per day re-broadcast by SEI in America. See Exhibits 31 (Polish) and 32 (certified English translation) at TP7007466 (inaugural program guide). Shortly thereafter, SEI (by its affiliate TVP USA) also began the distribution of *TV Polonia* via a local cable operator, Prime Cable of Chicago.

35. Since September 12, 1995, TVP has been fully aware of and approved (until this litigation) SEI's re-broadcasting (by its corporate affiliates) of *TV Polonia* in North America 24 hours per day, 7 days a week (including re-runs and repeat programming). Far from complaining about such re-broadcast, representatives of TVP repeatedly expressed to me TVP's desire that the full-time re-broadcast of *TV Polonia* commence at the earliest possible date.

36. Indeed, the President of the TVP Management Board, Wiesław Walendziak, sent me a letter (a true and correct copy of which is attached hereto as Exhibits 33 (Polish) and 34 (certified English translation)), dated February 5, 1996, to congratulate me on successfully bringing *TV Polonia* to the American market and to confirm that SEI's obligations under the Agreement had been satisfied:

We congratulate you on your achievements to date in connection with the implementation of the satellite broadcasting of Television Polska S.A., TV Polonia in the American market. The Management Board of Television Polska S.A. hereby states (finds) that the contractual obligations of Television Polska USA Inc. and those of Television Polska Canada Inc. as set forth in § 5.2 of the Agreement dated December 14, 1994, executed between Television Polska S.A. and Spanski Enterprises Inc. relative to the obtaining of a stated number of subscriber commitments prior to the commencement of broadcasting of the Program and commencing the permanent broadcasting of the Program have been complied with. In accordance with the above, as of December 1, 1995, the terms of such Agreement are no longer conditioned upon fulfilling the above-cited provision.

Exhibit 34 at SEI 000007.

37. Moreover, as part of TVP's efforts to monitor the re-broadcast of *TV Polonia* in the Americas, TVP appointed its representatives to sit on the respective boards of directors of TVP USA and TVP Canada. As evidenced by the November 20 1996 Board Minutes of TVP USA (a true and correct copy of which is annexed hereto as Exhibit 35), a representative of

TVP's Management Board, Adam Brodziak, attended and actively participated in such meetings. See Exhibit 35 at SEI 001712.

38. As reflected in the November 20, 1996 TVP USA Board Minutes, TVP was wholly aware of and approved TVP USA's re-broadcast of the *TV Polonia* signal, including reruns and other repeat programming, in the United States. Exhibit 35 at SEI 001712 (referring to the delay in "providing the full time TV POLONIA channel"); id. at SEI 001714 ("Director Brodziak advised the Board that TVP S.A. Executive Committee is prepared to help TVP USA Inc., in any way it will find fit **to launch full time TV POLONIA channel on DBS.**") (emphasis added). Shortly after this TVP USA Board meeting, in December 1996, I wrote to Adam Brodziak, in his position as a member of the TVP Management Board, advising TVP that beginning on January 1, 1997, SEI (and its affiliated companies) would begin the re-broadcast of *TV Polonia* in North America 24 hours per day, 7 days per week via satellite (free-to-air). A true and correct copy of my fax to Adam Brodziak is attached hereto as Exhibits 36 (Polish) and 37 (certified English translation).

39. The TVP USA Board Minutes also reflect TVP's approval (by way of the participation in the meeting and affirmative vote of approval of Mr. Brodziak, a member of TVP's Management Board), of the form and substance of the financial statements to be provided to TVP by SEI (and its affiliates) pursuant to the Agreement. See Exhibit 35 at SEI 001715 (unanimously adopting form of TVP USA financial statements to be provided to TVP); see also Exhibit 38 (a true and correct copy of the November 22, 1998 TVP USA Board of Director meeting minutes) at SEI 001730 ("as far as TVP USA financial statements are concerned, its format was adopted unanimously by the Board of Directors in 1996"). The financial statements (and related financial projections) have been provided to and accepted by TVP in this form since

1996 without complaint (until this lawsuit). In addition, financial projections (including expenditures for marketing and promotion) were also forwarded to TVP. See, e.g., Exhibits 39 (Polish) and 40 (certified English translation of letter to Adam Brodziak forwarding TVP USA Board Minutes and financial projections).

SEI Successfully Transitions the Re-Broadcast of *TV Polonia* to a Subscription Model

40. Following the initial period of DBS satellite re-broadcast of *TV Polonia* in North America (on the Microspace platform), TVP USA suspended such distribution on February 4, 1998, and began the final stage of negotiations in March 1998 with EchoStar Satellite Corporation (“EchoStar”) for the subscription-based, 24 hour per day satellite re-broadcast of *TV Polonia* on EchoStar’s Dish Network platform. On March 18, 1998, SEI and TVP issued a joint statement (a true and correct copy of which is annexed hereto as Exhibits 41 (Polish) and 42 (certified English translation)) advising that the re-broadcast of *TV Polonia* on EchoStar’s Dish Network platform would begin in May-June 1998.

41. In connection with TVP USA’s negotiations with EchoStar, on March 24, 1998, I received a fax (a true and correct copy of which is annexed hereto as Exhibit 43) from Michael Schwimmer, EchoStar’s Vice President – Programming, asking for a written statement from TVP confirming that TVP USA had the exclusive rights to re-broadcast *TV Polonia* in the United States.

42. I asked TVP to provide such a written statement, and TVP was happy to do so that same day (a true and correct copy of which is annexed hereto as Exhibit 44), again confirming in writing that:

... Telewizja Polska USA Inc. represented by Mr. B.M. (Bob) Spanski and Mr. B.T. (Bob) Pisarek is the only legal entity having the right, granted by the exclusive agreement, to receive and rebroadcast on the

territory of the United States of America the satellite programme produced by TELEWIZJA POLSKA - S.A. known as TV Polonia.

Exhibit 44 at ESLLC000535, SEI 000166 (March 24, 1998 statement co-executed by TVP's President, Ryszard Miazek, and Vice President Adam Brodziak) (emphasis added).

43. The following day, on March 25, 1998, TVP's Director of the International Relations Department, Jerzy Romański, sent a facsimile (a true and correct copy of which is annexed hereto as Exhibit 45) to EchoStar similarly confirming TVP USA's exclusive distribution rights:

This is to confirm that Telewizja Polska USA, Inc., based in Elk Grove Village, Illinois **holds the exclusive rights** to the television programming produced by Telewizja Polska S.A. in Warsaw, and known as TV Polonia for the territory of USA.

The **exclusive license** is valid until December 13, 2019, and may be prolonged for additional terms.

Telewizja Polska USA, Inc. fulfills all of its obligations under the terms of the License, and therefore is not in any breach of the License Agreement.

Exhibit 45 at SEI 000721 (emphasis added).

44. On April 30, 1998, TVP USA entered into a multi-year contract for the distribution of *TV Polonia* on EchoStar's subscription-based Dish Network platform. A true and correct copy of TVP USA's agreement with EchoStar is attached hereto as Exhibit 46.

45. By letter dated May 4, 1998 (a true and correct copy of which is attached hereto as Exhibits 47 (Polish) and 48 (certified English translation)), I informed TVP that an agreement had been executed with EchoStar, and that it was anticipated that *TV Polonia* would be available to subscribers by the end of May 1998 at a monthly subscription fee of \$14.99 (or, as part of a package with two Polish-language radio stations, for \$19.98 per month). TVP responded by letter dated May 5, 1998 (a true and correct copy of which is annexed hereto as Exhibits 49

(Polish) and 50 (certified English translation)) wherein the TVP Management Board acknowledged receipt of my May 4th letter and expressed its pleasure that TVP USA had secured a multi-year distribution contract with EchoStar.

46. In the TVP Board of Directors' Report on Company Activities for the Period from January 1 to December 31, 1998 (annexed hereto as Exhibits 51 (Polish) and 52 (certified English translation)), the TVP Board of Directors reported that:

RETRANSMISSION OF TV POLONIA PROGRAM IN THE USA

In compliance with [the] signed Agreement, implementation of the project will be [sic: is] managed by the American partner of TVP S.A., Mr. Bogusław Spański, who holds the rights to distribute the signal on the US and Canadian territory. The TV Polonia program is broadcast twenty-four hours a day in the digital DBS system. [...]

On April 30, 1998, TVP USA signed a long term agreement with Echostar Communication Company.

Exhibit 52 at TP 9000682 (noting that the subscription fee is \$14.99 for TV Polonia and \$4.99 for two Polish radio programs).

47. The terms of TVP USA's agreement with EchoStar, including the financial implications to TVP, were fully disclosed to Jerzy Romański, TVP's representative to the Board of Directors of TVP USA, at a May 25, 1998 board meeting. A true and correct copy of the May 25, 1998 TVP USA Board of Directors meeting are annexed hereto as Exhibit 53. As memorialized by the Board minutes, Mr. Romański was advised that TVP USA would contractually receive 30 % of subscription fees as to the first 10,000 subscribers, and 50 % of subscription fees for all subscribers over 10,000. It was further explained, clearly understood, and accepted by Mr. Romański, that pursuant to the Agreement TVP's share of subscriber fees (\$14.99 for *TV Polonia*) would be "approximately 36 cents" per subscriber for the first 10,000 subscribers (*i.e.*, $\$14.99 \times 30\%$ (TVP USA share) $\times 8\%$ (TVP share) = \$0.35976) and

“approximately 60 cents” of subscription fees for all subscribers over 10,000 (*i.e.* \$14.99 x 50% (TVP USA share) x 8% (TVP share) = \$0.5996) – representing 8% of the revenues received by TVP USA derived from its exploitation of *TV Polonia* in the Territory. Exhibit 53 at 3-4; see also Exhibit 38 (Nov. 22, 1998 TVP USA Board of Directors meeting minutes) at SEI 001729 (disclosing to Jarosław Pachowski, TVP’s representative and member of its Management Board that *TV Polonia* was being offered on EchoStar as part of a “Polish Package” which included two Polish radio stations for \$19.98 “which constituted \$14.99 for TV Polonia and \$4.99 for two radio channels”).

48. At this TVP USA Board of Directors meeting, Mr. Romański also took the opportunity to verify the financial reports submitted by TVP USA to TVP against the company’s banking records. Following a detailed analysis of these materials, Mr. Romański deemed TVP’s quarterly financial reports for 1997 to be entirely accurate. Exhibit 53 at 4.

49. On June 1, 1998, TVP issued a press release (a copy of which is annexed hereto as Exhibits 54 (Polish) and 55 (certified English translation)), which marked the commencement of the broadcast of *TV Polonia* on EchoStar’s Dish Network:

In accordance with earlier announcements, following a three-month hiatus attributable to necessary changes in broadcast platforms, TV Polonia is again available to viewers on the DBS system throughout the United States, 24 hours a day. The Polish program is distributed via the satellite company’s platform, EchoStar, previously known as Dish Network. [...]

The monthly subscription rate for the package amounts to \$19.99 USD (TV Polonia -- \$14.99 USD), two Polski Radio (Polish Radio) programs – (\$4.99 USD). [...]

In accordance to the Agreement dated December 14, 1994, the exclusive distributor of TV Polonia in North America is the Spanski Enterprises, Inc. (SEI) company that has assumed to bear all costs associated with this new venture.

Exhibit 55 at TP7005054-55 (emphasis added).

50. It is notable that the launch of *TV Polonia* on EchoStar on June 1, 1998 preceded similar such broadcast efforts by European giants BBC and Deutsche Welle (both stations which receive governmental budgetary subsidies). Following the launch, the number of paying subscribers to *TV Polonia* grew to over 26,000 by early 2002.

The Revocation of the Poltel Assignment

51. Notwithstanding that TVP knew of SEI's corporate structure (including Poltel) from the outset of our contractual relationship (see, e.g., Exhibits 56 (Polish) and 57 ("In the first days of July, we received the documents confirming the establishment by SEI of a corporation to implement the subject matter of the Agreement."); Exhibits 58 (Polish) and 59 (certified English translation of August 21, 1995 letter to TVP discussing Poltel and its license agreements with TVP USA and TVP Canada)), in May 1998, TVP began to complain that the assignment by SEI to Poltel was not permitted by the Agreement. See, e.g., Exhibit 53 (May 25, 1998 TVP USA Board minutes) at 5.

52. Although SEI disagreed with TVP's position regarding this issue of corporate structure and believed that the structure provided the best protection against frivolous litigation (see generally Exhibit 38 at 9-10; Exhibit 53 at 5-6), because SEI had initiated discussions and negotiations with TVP concerning the possibility of expanding the scope of its exclusive license and a possible amendment to the Agreement (see, e.g., Discussion at paragraphs 57-60, *infra*; Exhibits 60 (Polish) and 61 (certified English translation of letter, dated May 25, 1998, to TVP offering to distribute *TV Polonia* in Australia at SEI's cost of \$1,200,000 per year)), SEI accommodated TVP's request and the Assignment was cancelled by instrument dated July 27, 1999, which returned all rights under the Agreement to SEI. A true and correct copy of the Assignment revocation is attached hereto as Exhibit 62. At the same time, new license

agreements were entered into between SEI and TVP USA and TVP Canada. True and correct copies of these new license agreements are attached hereto as Exhibits 63 and 64.

53. TVP was fully aware that the Poltel Assignment had been cancelled. In a July 15, 1999 letter, I informed Mr. Marek Staszak, Director of TVP's Legal and Organizational Office, about my decision to revoke the Poltel assignment and my intent to give the appropriate documents to Mr. Jaroslaw Pachowski, a member of TVP's Management Board. See Exhibits 65 and 66 (certified English translation of July 15, 1999 letter). On August 4, 1999, I personally handed Mr. Pachowski an executed copy of the Assignment revocation together with copies of the new license agreements between SEI and TVP USA and TVP Canada at a meeting we were both attending in Los Angeles, California.

54. Indeed, I now suspect that TVP's objection to the SEI affiliate Poltel was motivated not by any objection to the corporate structure designed by SEI to implement the Agreement, but because TVP had or wanted to create a new agency which it sought to call "POLTEL." See Exhibit 52 at TP9000628.

SEI's Initial Exploitation of *TV Polonia* on the Internet

55. Although it was a fairly novel means for the distribution of television programming content at the time, SEI (by its corporate affiliates) began distributing *TV Polonia* programming on the Internet (free of charge and at SEI's own expense) in September 1998 pursuant to section 5(1) of the Agreement. TVP was made fully aware of that fact (see, e.g., Exhibit 38 (Nov. 22, 1998 TVP USA Board of Director meeting minutes) at SEI 001730 (disclosing to Jerzy Romański and Jarosław Pachowski, the latter a member of TVP's Management Board, that "... TV Polonia is live on the Internet since September 1998.... TV Polonia on [the] Internet is currently free of charge, but management of TVP USA is planning

[the] introduction of [a] subscription service, which shall offset substantial costs....”)); see also Exhibits 67 (Polish) and 68 (certified English translation of March 2, 1999 letter to Leszek Wasiuta disclosing SEI’s website www.tvpolonia.com and stating availability of “TV Polonia live streaming on the Internet via Real Video”). Indeed, TVP has continued until early 2008 to market (on TVP’s own website) SEI’s website as the worldwide distributor of *TV Polonia* on the Internet. A true and correct copy of TVP’s website is annexed hereto as Exhibits 69 (Polish) and 70 (certified English translation) (“TV Polonia [can be received] through the Internet in the whole world. Distributor of the signal is Spanski Enterprises Inc. (SEI). More information can be obtained on POLISH TELEVISION USA site www.tvpolonia.com”).

56. Other than failed tests in 1998 as to the possible “live” streaming on the Internet of *TV Polonia*, SEI’s distribution of *TV Polonia* on the Internet has always been in the form of video-on-demand whereby users may select from a library of shows for video streaming (*i.e.*, for viewing purposes only, and not for downloading to their own computers).

The First Addendum to the Agreement – TVP Confirms SEI’s Exclusive Internet Rights

57. Unbeknownst to me at the time, but disclosed in the documents which TVP produced in this action, an NIK audit of TVP commenced in 1998 as well as an internal TVP audit initiated in 1999 resulted in official “recommendations” and/or demands that TVP negotiate an amendment to the Agreement to cure purported “ambiguities” and other provisions (such as TVP’s audit rights) which were perceived to be unfavorable to TVP. See, e.g., Declaration of Jarosław Pachowski at ¶¶ 9-22 and Exhibits 5-22.

58. Following numerous discussions and negotiations which took place between July and November 1999, SEI and TVP entered into an addendum to the Agreement (the “First Addendum” dated November 4, 1999). The First Addendum was drafted primarily by TVP’s

legal department (SEI was not represented by counsel). True and correct copies of the First Addendum are annexed hereto as Exhibits 71 (Polish) and 72 (certified English translation).

59. Among other things, the First Addendum specifically addressed, and fully authorized, SEI's use of a "corporate structure" – *i.e.*, SEI's assignment of rights to affiliated entities such as Telewizja Polska USA and Telewizja Polska Canada – in connection with SEI's rebroadcast and Internet distribution of *TV Polonia*. See Exhibit 72 (First Addendum) at § 1(10).

60. Further, by the First Addendum, TVP expressly granted SEI the exclusive right to distribute *TV Polonia* programming via the Internet within the Territory. See Exhibit 72 (First Addendum) at § 1(2)-(3) ("TVP grants SEI the exclusive right to use TV Polonia Shows in its programming on the Internet."; "In order to implement Sections 2 and 3, TVP gives SEI [the] exclusive right to receive and use the signal on the Territory"). It was the intent of the parties and the purpose of the First Addendum to make it expressly clear that the Internet distribution of *TV Polonia* that SEI and its affiliated companies had engaged in since September 1998 – *i.e.* the "Video on Demand" of the individual programs of *TV Polonia* – was fully authorized and approved.

61. Notably, an internal TVP communication (dating from prior to the execution of the First Addendum and annexed hereto as Exhibits 73 (Polish) and 74 (certified English translation)), reflects that SEI had in fact been granted the exclusive rights to distribute *TV Polonia* on the Internet:

In connection with the proposal from the Radiopol company, kindly be advised that TVP S.A. is [a] party to a binding agreement with the S.E.I. company, whose objective is to distribute [the] TV Polonia program throughout the territories of both Americas. Pending the negotiations of the Appendix to said Agreement, TVP S.A. has granted approval of the exclusive rights to the TV Polonia signal for the internet as well to the S.E.I. company.

In light of the above, it is completely without purpose to conduct talks regarding TV Polonia's presence on the Internet throughout the territories of North and South America.

Exhibit 72 at TP 7006692.

62. Similarly, when TVP approached me to discuss its own plans for distributing programming content on the Internet, I asserted SEI's exclusive rights to distribute *TV Polonia* via the Internet in the Territory, and demanded that TVP implement technical measures to guarantee SEI's exclusivity. My demands were documented in an internal TVP memorandum produced in connection with this litigation from Grzegorz Gajewski to Robert Kwiatkowski and annexed hereto as Exhibits 75 (Polish) and 76 (certified English translation). See Exhibit 76 at TP7005203 ("Bob Spanski also expressed his thoughts regarding TVP S.A.'s placement of the TV Polonia signal on the internet. Invoking the Appendix to the Agreement concluded with him, he reminded about the incumbent obligation of TVP S.A. to install a 'firewall' that will guarantee him exclusivity via the internet as well.").

63. The First Addendum also clarified SEI's ability to assign its rights under the Agreement, as SEI deemed necessary, to facilitate its exploitation of *TV Polonia* in the Territory. See Exhibit 72 at § 1(10) ("SEI represents and TVP agrees that: in order to implement this Agreement it [SEI] will set up a corporate structure in ... countries in the Territory, and it will assign all rights, obligations and liabilities hereunder thereto, with the right to assign all or a part of them to other corporations within such structure.").

64. Throughout the term of the Agreement, SEI has transferred certain of its rights to its affiliated companies, such as TVP USA, TVP Canada and EuroVu S.A. ("EuroVu") for exploitation. These SEI affiliates enter into agreements with cable and satellite television

operators who, in turn, offer *TV Polonia* to their subscribers for a fee (a portion of which is paid to SEI's affiliates).

65. Further documenting the parties' agreement that SEI's affiliated companies were permitted to implement the Agreement (as amended), on December 16, 1999, Marek Staszak, Director of TVP's Legal and Organizational Office, wrote me a letter (a true and correct copy of which is annexed hereto as Exhibits 77 (Polish) and 78 (certified English translation)) confirming that TVP's audit rights were exercisable only in regard to the SEI affiliated companies actually performing the Agreement, and not to their parent company SEI:

In the name of the board of TVP S.A. and in connection with the appendix to the Agreement between SEI and TVP S.A., I respectfully declare that, in accordance with the desires of the parties to the contract, all provisions relating to the financial monitoring of SEI at the time of its ceding rights and obligations to existing corporations also relate to these corporations in the same time period in which they function in accordance with contracts made with SEI. This means that in the period where these corporations, and not SEI, are in fact subjects of the contract with TVP S.A., and the financial audit relates to those corporations, while SEI is excluded from it.

Exhibit 78 at TP 7006638.

66. In exchange for the rights granted to SEI by the First Addendum, TVP was granted very favorable rights to conduct financial audits of SEI's affiliated companies (the companies licensing *TV Polonia* and receiving revenues from the licensing) by TVP personnel. The original Agreement only permitted audits conducted by international auditing firms, which was expensive and therefore never pursued by TVP.

SEI Commences Subscription-based Internet Distribution of *TV Polonia* in February 2002

67. Although SEI (by its affiliate TVP USA) began distributing *TV Polonia* programming via the Internet free of charge in September 1998 (see Discussion *supra* at ¶ 55 and Exhibits 38, 68 and 70), SEI sought to develop this aspect of its business into a self-sufficient,

revenue generating method of distribution. See, e.g., Exhibit 38 at SEI 001730 (“TV Polonia on the Internet is currently available free of charge, but management of TVP USA is planning [the] introduction of [a] subscription service, which shall offset [the] substantial cost not only of development of the web page, but foremost maintenance of the computer servers and Internet ‘engines.’”).

68. Following a number of failed attempts to implement an online subscription-based model, in late 2001 and early 2002, SEI changed servers and completed the implementation of the necessary technical measures (*i.e.* for registering subscribers and processing subscription payments) to facilitate a workable Internet-based subscription model.

69. By letter dated March 20, 2002 (a true and correct copy of which is annexed hereto as Exhibits 79 (Polish) and 80 (certified English translation)), I advised the Director of TV Polonia Program Department (the “Director of TV Polonia”), Antoni Bartkiewicz, that:

The TVPolonia.com program was inaugurated on the Internet on February 6, 2002, and I would be hard put not to term it a success. The number of internet subscribers keeps growing and has already topped 2,000. Although North American subscribers predominate, a growing number of South American internet users are signing up.

Exhibit 80 at SEI 000049; see also Exhibits 81 (Polish) and 82 (certified English translation of March 26, 2002 Position of the Board of TVP S.A.) at ¶ 3 (SEI 000056) (same).

70. While the number of Internet “subscribers” quickly jumped into the thousands in the first quarter of 2002, no initial subscription fees were charged, as SEI (and TVP USA) heeded the concerns voiced by TVP that “introducing paid subscriptions of TV Polonia on [the] Internet will cause uproar among the people who currently use it for free.” Exhibit 38 at SEI 001731 (statement of Jarosław Pachowski at TVP USA Board of Director meeting). This was

also done to gain maximum exposure for the service, as subscription internet services at that time were not that common or popular and the service was still in development mode.

71. Thus, it was not until the second quarter of 2002 that the \$6.99/month Internet subscription fee was charged, and the revenues derived there from reported to TVP.

TVP USA Sues EchoStar and Transfers Satellite Distribution

72. The April 1998 agreement entered into between TVP USA and EchoStar for the subscription-based satellite distribution of *TV Polonia* in the United States expired, pursuant to its terms, on April 30, 2001 subject to a 12-month “wind-down” period. Exhibit 46 at ¶ 2 (SEI 002140). Thus, the broadcast of *TV Polonia* on EchoStar’s Dish Network platform was to fully terminate on April 30, 2002 absent the further agreement between TVP USA and EchoStar.

73. Although TVP USA entered into good faith negotiations with EchoStar for a contract renewal beginning in early 2001 (see, e.g., Exhibit 83), TVP USA and EchoStar were unable to reach an agreement by the April 30, 2001 termination date, nor during the following 12-month wind-down period that followed.

74. As an improper negotiation tactic, and notwithstanding that EchoStar was contractually obligated to pay TVP USA its share of subscriber fees within 30 days after the end of each calendar month (see Exhibit 46 at ¶ 3.2), EchoStar failed and refused to pay TVP USA (or to report subscriber numbers to TVP USA) for the period from January 1, 2002 to May 1, 2002.

75. In addition, beginning on April 1, 2002, EchoStar contacted TVP directly seeking TVP’s intervention as to EchoStar’s continued renewal negotiations with TVP USA. A true and correct copy of the facsimile from Michael Schwimmer, EchoStar’s Senior Vice President – Programming, to Antoni Bartkiewicz, Director of TV Polonia, is annexed hereto as Exhibit 84.